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No. 698

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Supreme Court of the United States

OCTOBER TERM, 1960

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; SILVIO GUTIERREZ; and NAPOLEON DUPOUY,
Respondents

REPLY BRIEF FOR PETITIONER

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Point I of the respondent banks' brief in opposition seeks to minimize the importance of the decision of the court below by characterizing that court's determination as "one of fact" and argues that "the legal principles involved in the determination of that factual issue do not merit this Court's consideration . . ." (Brief for Respondents, p. 6). But respondents do not attempt to show what "facts" the Court of Ap-

peals determined, or in what respect the decision was factual. As the court itself said, the decision was on a legal question—a question quite fundamental to the meaning and effect of the Treaty of Extradition between the United States and Venezuela.

The court below decided that no "need" appeared for the evidence sought by the subpoenas, because it was not apparent to the court how this evidence would add to the legal elements of Venezuela's case against Perez Jimenez under the Treaty. The court said "Nor has any showing been made as to how $4,400,000 will exceed *in legal effectiveness*, insofar as meeting the statutory requirement of over $200 is concerned, the $500,000 already claimed by Venezuela" (emphasis supplied). Petition, Appendix 1, p. 17.

The court apparently regarded the $200 minimum provided in Article II of the Treaty as the measure of the "need" for evidence. But of course that figure is only a jurisdictional minimum. The measure of need of evidence is a practical test, not a dollar yardstick, and petitioner has taken pains to point out (Petition, pp. 24-26) two very important factors in that test: (1) Where there are many charges in the complaint, ample evidence must be adduced as to each charge, regardless of the total dollar sum involved, lest the extradition judge view the evidence of any particular charge as insufficient; (2) the consequence of a deficiency of evidence as to particular charges is very serious, because under the Treaty—and this is general extradition doctrine—the demanding state, after extradition, can try a defendant only on charges based on the factual showing which the extradition judge decides warrants extradition. *Bryant* v. *United States*, 167 U.S. 104, 108; *Greene* v. *United States*, 154

Fed. 401, 405-406 (5th Cir. 1907), *cert. den.*, 207 U.S. 596; *cf. Collins* v. *Loisel*, 262 U.S. 426, 431. Thus, the Court of Appeals is plainly wrong in its conclusion that evidence of anything more than $200 worth of embezzlement or malversation is cumulative, as a matter of law. Its error could give the defendant a wholly unwarranted immunity from trial on important crimes, and could render useless at the trial the same evidence that petitioner now seeks or evidence similar thereto.

In short, respondents' effort to explain the lower court's decision as merely "one of fact" simply ignores that, rather, the decision was on a clear question of law—the legal effect of the provisions of Articles II and XIV of the Treaty, which the court plainly misunderstood and which, in itself, is a question of great general importance in the law of extradition.

But there is another consideration which the respondents ignore. The lower court attached conclusive force to the fact that the demanding government has rested its case on the evidence already produced, subject to its right later to request reopening. This, said the lower court, means that, as a matter of law, additional evidence *must* be merely cumulative and therefore unnecessary.

The effect of this ruling, as a practical matter, is that, even though the court strongly implied that the power exists to issue a subpoena on application of the demanding government, a case can never arise when the exercise of the power will be appropriate. For an extradition complaint must be sworn, and it is obvious that a demanding government would not commence extradition proceedings, unless it believed that

it had in hand enough evidence to satisfy the minimum requirements of the asylum state. If the demanding government expresses this belief—which is obvious without expression—then, said the Second Circuit, the ground for getting further evidence by subpoena is destroyed. But the fallacy in that holding is that the determination of sufficiency of evidence is made by the extradition judge, not by the demanding government, and the judge may later decide that the evidence is *not* sufficient as to some, or even all, charges. For that reason, the fact that the demanding country believes that it can win on the evidence already in hand should not weaken the justification for a subpoena.

The additional and new evidence now sought is obviously important; there is on the facts—which no one has denied—every indication that the bank records would show or strongly confirm the wrong-doing in question, perhaps as the very best evidence available anywhere. To hold, as did the lower court, that this evidence is barred from scrutiny merely because the demanding state is willing to submit its case, if need be, on something less adds up to holding that power exists which can never be exercised.

It would be disingenuous to ignore that the lower court may have been moved to an untenable position by a desire to avoid facing up to the basic issue of subpoena power. That basic issue is presented by this case—exactly as it is in the companion case pending on petition for certiorari (No. 77) to review the decision of the Court of Appeals for the Fifth Circuit.

It cannot be laid to one side in this case any more than in the other.

Respectfully submitted,

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